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NORAZMI ALI v. TIMBALAN MENTERI DALAM NEGERI, MALAYSIA & ORS

HIGH COURT MALAYA, IPOH
HASHIM HAMZAH J
[CRIMINAL APPLICATION NO: AA-44-68-10-2019]
B 6 OCTOBER 2020

CRIMINAL PROCEDURE: *Habeas corpus – Application for – Grounds – Whether detention order contravened art. 149 of Federal Constitution – Whether mere formal defect – Assertions that applicant denied of rights to be defended by an advocate – Whether assertions rebutted – Whether inference favourable to applicant drawn by failure of respondent to furnish material evidence – Whether breach of mandatory procedural requirements established – Whether detention rendered unlawful – Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987, r. 3*

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The applicant was detained in Pusat Pemilihan Akhlak Simpang Renggam by virtue of a detention order which was issued by the Deputy Minister of Internal Security pursuant to s. 6(1) of the Dangerous Drugs Act (Special Preventive Measures) Act 1985 ('Act'). This was the applicant's application for a writ of *habeas corpus*. The issues raised by the applicant for the E determination of this court were: (i) whether the detention order was in contravention with art. 149 of the Federal Constitution ('FC'); and (ii) whether there was a denial of the applicant's rights to be defended by an advocate by the Advisory Board.

F **Held (allowing application for *habeas corpus*):**

(1) Article 149 of the FC allows for a legislation to be made to stop or prevent subversions or actions prejudicial to public order by any substantial body of persons notwithstanding that it is inconsistent with any of the provisions of arts. 5, 9, 10 or 13 of the FC. The defect in the G detention order was beyond a mere formal defect. There was nothing to suggest that the Deputy Minister, in issuing the detention order, had taken into consideration the factor that the applicant was associated with a substantial group of persons in committing the drug activities, which would manifest in the ordinary course of event, either in the detention H order or in the affidavit evidence. The respondents had fallen short of proving that the detention order issued against the applicant was lawful. (paras 13, 18 & 20)

(2) The applicant's averments that he was denied, *inter alia*, of his rights to be defended by an advocate of his choice during the hearing of his I representation before the Advisory Board and the request for more time to appoint an advocate during the hearing, were positive averments

which was not inherently incredible or inherently improbable. The applicant also, under Form 1 under r. 3 of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 ('Rules'), made it clear that he intended to appear before the Advisory Board and to be legally represented. In the event that the assertions were not credibly denied by the respondents, the court accepted the assertions as being unrebutted. (paras 21-23)

(3) While under art. 151(3) of the FC and s. 14 of the Act, the respondents were not required to disclose facts or to produce documents which the respondents considered to be against national interest, the court was still left to decide on the conflicting affidavit evidence adduced by both parties. The conflicting evidence could only be resolved by either party furnishing any contemporaneous documentary evidence to support their contention respectively. Unless the existence of any other contemporaneous documentary evidence was shown to the contrary, the minutes of the Advisory Board's hearing of the applicant's representation, which was clearly within the custody and control of the respondents, became material evidence. In circumstances where the material evidence was not furnished for the determination of the court, an inference favourable to the applicant should be preferred. Hence, there was indeed a breach of a mandatory procedural requirement under the Act and the Rules, which rendered the detention unlawful. (paras 26 & 34)

Case(s) referred to:

Abdul Razak Baharudin & Ors v. Ketua Polis Negara & Ors And Another Appeal [2005] 4 CLJ 445 FC ***(refd)***

Chong Kim Loy v. Timbalan Menteri Dalam Negeri, Malaysia & Anor [1990] 1 CLJ 61; [1990] 1 CLJ (Rep) 731 HC ***(refd)***

Chua Kian Voon v. Menteri Dalam Negeri Malaysia & Ors [2020] 1 CLJ 747 FC ***(refd)***

Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 FC ***(refd)***

Ex Parte Johannes Choeldi & Ors [1960] 1 LNS 25 HC ***(refd)***

Gunasingam Kolasegaram & Yang Lain lwn. Timbalan Menteri Keselamatan Dalam Negeri Malaysia & Yang Lain [2005] 8 CLJ 144 HC ***(refd)***

Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister Of Home Affairs), Malaysia [1969] 1 LNS 65 FC ***(refd)***

Kumaran Suppiah v. Dato' Noh Hj Omar & Anor [2006] 4 CLJ 675 FC ***(refd)***

Kumaravel Periasamy lwn. Timbalan Menteri Keselamatan Dalam Negeri & Yang Lain (Rayuan Jenayah 05-120-2008(A) (Unreported) ***(refd)***

L Rajanderan R Letchumanan v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2010] 7 CLJ 653 FC ***(refd)***

Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 3 CLJ 914 FC ***(refd)***

Mohamad Ibrahim Kamarudin v. Timbalan Menteri Dalam Negeri, Malaysia & Yang Lain [2018] 1 LNS 59 HC ***(refd)***

Mohammad Azanul Haqimi Tuan Ahmad Azahari v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2019] 8 CLJ 465 FC ***(refd)***

Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 4 CLJ 613 FC ***(refd)***

Mohd Najib Yusof v. Timbalan Menteri Dalam Negeri Malaysia & Anor [2016] 1 LNS 374 HC ***(refd)***

Muhammad Jailani Kasim v. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2006] 4 CLJ 687 FC ***(refd)***

Nagaraja Ponusamy v. Menteri Dalam Negeri, Malaysia & Ors [2010] 4 CLJ 133 FC ***(refd)***

Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & Satu Lagi [1994] 4 CLJ 47 SC ***(refd)***

SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors [2009] 6 CLJ 705 FC ***(refd)***

Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v. Ong Beng Chuan [2006] 4 CLJ 703 FC ***(refd)***

Zali Shariff v. Timbalan Menteri Dalam Negeri, Malaysia & Anor [2004] 5 CLJ 296 HC ***(refd)***

Legislation referred to:

Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 6(1), 9, 11C, 14

Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987, rr. 3, 4(3), 5(2), (3), 6(3)

Federal Constitution, arts. 5, 9, 10, 13, 149, 151(3)

Reported by S Barathi

JUDGMENT

Hashim Hamzah J:

Introduction

[1] This is the applicant's application for a writ of *habeas corpus* filed by way of a notice of motion dated 22 October 2019 (encl. 1).

[2] The applicant is currently detained in Pusat Pemulihan Akhlak Simpang Renggam by virtue of a detention order dated 30 November 2018 (hereinafter referred to as the "detention order") which was issued by the Deputy Minister of Internal Security pursuant to s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 [Act 316] (hereinafter referred to as "the Act").

[3] In short, two issues were raised by the applicant for the determination of this court, namely:

(i) whether the detention order is in contravention with art. 149 of the Federal Constitution; and

(ii) whether there was a denial of the applicant's rights to be defended by an advocate by the Advisory Board.

Law

[4] First and foremost, s. 11C of the Act provides that:

> (1) There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.
>
> (2) The exception in regard to any question on compliance with any procedural requirement in subsection (1) shall not apply where the grounds are as described in section 6A.

[5] In determining the present application, I am primarily guided by what has been enunciated by the Federal Court in the case of *Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 3 CLJ 914 where Abdul Hamid Mohamad FCJ (as he then was) in delivering the judgment of the court, held in the following manner:

> In our view, courts must give effect to the amendments. That being the law, it is the duty of the courts to apply them. So, in a *habeas corpus* application where the detention order of the Minister made under s. 4(1) of the Ordinance or, for that matter, the equivalent ss. in ISA 1960 and DD (SPM) Act 1985, the first thing that the courts should do is to see whether the ground forwarded is one that falls within the meaning of procedural non-compliance or not. To determine the question, the courts should look at the provisions of the law or the rules that lay down the procedural requirements. It is not for the courts to create procedural requirements because it is not the function of the courts to make law or rules. If there is no such procedural requirement then there cannot be non-compliance thereof. Only if there is that there can be non-compliance thereof and only then that the courts should consider whether, on the facts, there has been non-compliance.

[6] See also *Abdul Razak Baharudin & Ors v. Ketua Polis Negara & Ors And Another Appeal* [2005] 4 CLJ 445 (FC).

[7] Next, in another case of *Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v. Ong Beng Chuan* [2006] 4 CLJ 703, the Federal Court approves its previous decision in *Muhammad Jailani Kasim v. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2006] 4 CLJ 687 which provides a guideline in determining whether there is a breach of a procedural requirement, in the exact following words:

> [6] The resultant matter for consideration is whether the breach is subject to judicial review. A right to judicial review when there is a breach of a procedural requirement in the making of a detention order under the Act was considered by this court in *Muhammad Jailani Kasim v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2006] 4 CLJ 687 FC in the following words:

The effect of a breach of such procedural requirements had been considered in a number of cases. See, for example, *Puvaneswaran v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1991] 2 CLJ 1199; [1991] 3 CLJ (Rep) 649; [1991] 3 MLJ 28; *Low Teng Hai v. Menteri Dalam Negeri, Malaysia & Others* [1992] 2 CLJ (Rep) 816 and *Aw Ngoh Leang v. Inspector General of Police* [1993] 1 CLJ 373; [1993] 1 MLJ 65. It has been recognised in these cases that a procedural requirement may be mandatory or directory. A mandatory requirement is one that goes to the root of the matter and is of direct relevance to the detention order. The breach of a mandatory requirement will render the detention order invalid without the need to establish any prejudice. The breach of a procedural requirement which is directory will not be significant provided that there is substantial compliance with the rules with no prejudice having been suffered by the detainee. However it must be observed that the power of the Court to intervene is limited to only matters of compliance with procedural requirements by section 11C(1) of the Act which reads as follows:

> There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.

It is clear that the section restricts judicial review to only questions on compliance with any procedural requirement governing any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power. Such procedural requirements can only be ones that will go to the root of the matter and be of direct relevance to the making of the detention order. The section only refers to a question of compliance with procedural requirements without subjecting it to any prejudice having been suffered. The test, therefore, in determining whether a breach can be subjected to judicial review is whether it is in compliance with any procedural requirement governing any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with the Act without the need to establish any prejudice. Such a determination will be greatly facilitated, though not decisively, by a consideration of the effect of the statutory provision that has been breached, that is to say, whether it is mandatory or directory in nature.

[8] In another Federal Court case of *Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 4 CLJ 613, it was held that a writ of *habeas corpus* must be directed against the current order of detention even if the earlier arrest or detention is irregular. The following is observed:

> The corollary is that a detention order can be made against a person under s. 6(1) even when his detention under s. 3(2) was irregular. The general rule that a writ of *habeas corpus* must be directed against the current order of detention therefore applies where a detention under s. 6(1) has been made subsequent to an arrest and detention under s. 3(1) and (2). It follows that where a detention order has been made under s. 6(1) the writ of *habeas corpus* must be directed only against that order even if the earlier arrest and detention are irregular. This view is supported by *Barnardo v. Ford* [1892] AC 326 where Lord Halsbury said that he could not agree to the proposition that if a court is satisfied that illegal detention has ceased before application for the writ has been made, nevertheless the writ might issue in order to vindicate the authority of the court against a person who has once, though not at the time of the issue of the writ, unlawfully detained another or wrongfully parted with the custody of another. Thus any irregularity in a detention order made under s. 3(2) when it has been superseded by one under s. 6(1) is not a relevant matter for consideration. In this regard *The Law of Habeas Corpus*, 2nd edn, by RJ Sharpe says at p. 179:
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> > It has been held consistently that the relevant time at which the detention of the prisoner must be justified is the time at which the court considers the return to the writ. This rule means that nothing which has happened before the present cause of detention took effect will be relevant to the issue before the court, unless by reason of some special consideration arising from the particular proceedings.
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> And at p 186:
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> > On the present state of the law, in almost every instance, the relevant time at which the detention is to be justified is the time at which the court considers the case. Prior illegality will not be relevant unless by reason of some special rule derived from the particular nature of the proceedings involved.
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> Therefore a prior illegality which has ceased cannot be the subject matter of inquiry.

[9] See also *L Rajanderan R Letchumanan v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2010] 7 CLJ 653 (FC).

[10] With regard to the burden of proof, the Federal Court's decision in *SK Tangakaliswaran Krishnan v. Menteri Dalam Negeri, Malaysia & Ors* [2009] 6 CLJ 705 is authoritative where it was held by Gopal Sri Ram FCJ (as he then was) in delivering the judgment of the court as follows:

[5] In my considered judgment the point at stake falls to be resolved with reference to the principles governing the burden of proof in an application for *habeas corpus*. It is settled law that on an application for *habeas corpus* the burden of satisfying the court that the detention is lawful lies throughout on the detaining authority. See, *Chng Suan Tze v. The Minister of Home Affairs & Ors and Other Appeals* [1988] 1 LNS 162. In *Mohinuddin v. District Magistrate*, Beed AIR [1987] SC 1977, the Supreme Court of India observed as follows in the context of art. 22 of the Indian Constitution from which is drawn our art. 151:

> It is enough for the detenu to say that he is under wrongful detention, and the burden lies on the detaining authority to satisfy the Court that the detention is not illegal or wrongful and that the petitioner is not entitled to the relief claimed. This Court on more occasions than one has dealt with the question and it is now well-settled that it is incumbent on the State to satisfy the Court that the detention of the petitioner/detenu was legal and in conformity not only with the mandatory provisions of the Act but also strictly in accord with the constitutional safeguards embodied in Art. 22(5).

[11] With all of the above authorities in mind, I now turn to consider the issues raised in the present application.

First Issue: Whether The Detention Order Is In Contravention With Article 149 Of The Federal Constitution

[12] On this issue, learned counsel for the applicant submitted as follows.

[13] Firstly, art. 149 of the Federal Constitution allows for a legislation to be made to stop or prevent subversions or actions prejudicial to public order by any substantial body of persons notwithstanding that it is inconsistent with any of the provisions of arts. 5, 9, 10 or 13 of the Federal Constitution. The following is observed:

> Article 149. Legislation against subversion, action prejudicial to public order, etc.
>
> (1) If an Act of Parliament recites that action has been taken or **threatened by any substantial body of persons**, whether inside or outside the Federation:
>
> (a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or
>
> (b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or
>
> (c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or
>
> (d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

(e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or

(f) which is prejudicial to public order in, or the security of, the Federation or any part thereof, any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

(2) A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under this Article.

(emphasis added)

[14] Secondly, the Act was enacted pursuant to art. 149 of the Federal Constitution. It can be seen under the preamble of the Act that:

Long Title & Preamble

An Act to provide for the preventive detention of persons associated with any activity relating to or involving the trafficking in dangerous drugs.

WHEREAS action which is prejudicial to public order in Malaysia has been taken and further similar action is being threatened by a substantial body of persons both inside and outside Malaysia;

AND WHEREAS Parliament considers it necessary to stop such action;

NOW, THEREFORE, pursuant to Article 149 of the Constitution BE IT ENACTED by the Seri Paduka Baginda Yang di-Pertuan Agong with the advice and consent of the Dewan Negara and Dewan Rakyat in Parliament assembled, and by the authority of the same, as follows.

[15] According to learned counsel for the applicant, it is incumbent upon the respondents (the Minister or Deputy Minister) to firstly consider the existence of the said substantial body of persons and subsequently whether the applicant is associated with the said substantial body of persons before the applicant could be held under preventive detention under the Act. In my mind, the Act should be used only for the purpose it was intended for.

[16] On the other hand, the learned Federal Counsel submitted that the preamble should not be used to aid the interpretation of the clear provision under s. 6(1) of the Act. See *Kumaran Suppiah v. Dato' Mohd Noh Hj Omar* [2006] 4 CLJ 675 (FC) and *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701 (FC).

[17] The learned Federal Counsel also referred to the following authorities which, in summary, had decided that a mere surplus or omission of words in the detention order would not invalidate or render the said detention order defective. The authorities referred to are *Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister Of Home Affairs), Malaysia* [1969] 1 LNS 65; [1969] 2 MLJ 129 (FC), *Chong Kim Loy v. Timbalan Menteri Dalam Negeri, Malaysia & Anor* [1990] 1 CLJ 61; [1990] 1 CLJ (Rep) 731 (HC), *Zali Shariff v. Timbalan Menteri Dalam Negeri, Malaysia & Anor* [2004] 5 CLJ 296 (HC), and *Kumaravel Periasamy lwn. Timbalan Menteri Keselamatan Dalam Negeri & Yang Lain* (Rayuan Jenayah 05-120-2008(A)) (FC).

[18] However, I agree with learned counsel for the applicant that this defect is beyond a mere formal defect in the detention order. In doing so, I take a different stand from that of Mat Ghani Abdullah JC (as he then was) in *Mohamad Ibrahim Kamarudin v. Timbalan Menteri Dalam Negeri, Malaysia Dan Yang Lain* [2018] 1 LNS 59. I am of the considered view that the real issue for determination is whether the Deputy Minister in issuing the detention order has taken into consideration the factor that the applicant is associated with a substantial group of persons in committing the drug activities, which would, in my opinion, manifest in the ordinary course of event, either in the detention order or in the affidavit evidence. Upon careful perusal of the detention order, and the "Alasan-Alasan Yang Atasnya Perintah Itu Dibuat" and "Pengataan-Pengataan Fakta Yang Atasnya Perintah Itu Diasaskan" (exh. AS-1 in the affidavit in reply affirmed by Arbi bin Suhadat on 27 November 2019) together with all of the other affidavits and exhibits produced before this court, there was indeed nothing to suggest the same.

[19] In this regard, I agree with the approach taken by Zulkifli Bakar J (as he then was) in *Mohd Najib Yusof v. Timbalan Menteri Dalam Negeri Malaysia & Anor* [2016] 1 LNS 374, where it was held as follows:

> [14] The Applicant advanced the argument that the Deputy Minister (Dato Sri Dr Haji Wan Junaidi Tuanku Jaafar) had failed to address the identities of other persons who had involved in this drug activities with the Applicant. That being the case, it was further argued that the other persons' particulars must be ascertained to justify the detention of the Applicant in accordance with the preamble of DDA (SPM) 1985 that there is a threat by "substantial body of persons" to national security.
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> [15] I am mindful of this argument. However, in my opinion, it is ridiculous to state out all the particulars of every person in the related substantial group of drug transactions as from times to times the group will change and become larger with participation of new members. It is not in dispute that such particulars are restricted to be revealed for security purpose, to avoid the other suspects to be aware of them having been targeted by the police and to flee away from apprehension.

> [16] In this Court's view, the inherent part is to see whether the Deputy Minister when issuing the Detention Order has taken into account the factor that the Applicant has been associated with a substantial group of persons in committing this drug activities ...

[20] As such, I find that the respondents had fallen short of proving that the detention order issued against the applicant was lawful.

Second Issue: Whether There Was A Denial Of The Applicant's Rights To Be Defended By An Advocate By The Advisory Board

[21] On this issue, the applicant averred that he was denied of his rights to be defended by an advocate of his choice during the hearing of his representation on 9 January 2019 before the Advisory Board. The applicant further averred that he had requested more time to appoint an advocate during the hearing of his representation, which was denied by the Advisory Board. The following is the exact averment by the applicant in his affidavit in reply affirmed on 19 October 2010:

> 4. Saya menyatakan bahawa saya telah dinafikan hak untuk diwakili oleh peguambela sewaktu persidangan representasi yang berlangsung pada 9.1.2019. Saya telah pun membuat permohonan di hadapan Lembaga Penasihat pada tarikh tersebut agar saya diberikan masa untuk saya melantik peguam bela untuk mewakili saya sewaktu persidangan representasi, namun permohonan saya telah ditolak dan Lembaga Penasihat telah mengarahkan kes saya diteruskan pada tarikh tersebut walaupun tanpa kehadiran peguam bela. Saya mencabar supaya minit prosiding representasi bagi kes saya yang berlangsung pada 9.1.2019 dikemukakan bagi menyokong dakwaan saya. Saya menafikan dan menegaskan bahawa saya tidak pernah pada bila bila masa menyatakan bahawa saya tidak memerlukan khidmat peguambela.

[22] I am of the considered view that the applicant's averment above is a positive assertion which is not inherently incredible or inherently improbable. Furthermore, it can be seen under Form I under r. 3 of the Dangerous Drugs (Special Preventive Measures) (Advisory Board Procedure) Rules 1987 (hereinafter referred to as "the Rules") dated 30 November 2018, that the applicant had made it clear that he intended to appear before the Advisory Board and to be legally represented (see exh. "RH-2" in the affidavit in reply affirmed by Ramli bin Hussain on 6 November 2019).

[23] As such, in the event that the said assertion was not credibly denied by the respondents, the court should accept the former assertion as being unrebutted. This proposition is fortified through the decision of the Federal Court in *Nagaraja Ponusamy v. Menteri Dalam Negeri, Malaysia & Ors* [2010] 4 CLJ 133 where Gopal Sri Ram FCJ (as he then was) in delivering the judgment of the court held that:

A [3] In the circumstances adumbrated, what approach is the court to adopt? The answer to this question is well settled by a legion of authorities we find unnecessary to cite. It is this. Where the deponent to an affidavit makes a positive assertion, which is not inherently incredible or inherently improbable, and his opponent in his affidavit does not credibly deny that allegation, a court should accept the former assertion as standing
B unrebutted. Now apply that test here.

[24] In response to the applicant's assertion above, one Mohd Shafiq bin Rozali (the Secretary of the Advisory Board at the time) had affirmed an affidavit in reply on 20 May 2020, where it was deposed as follows:

C 2. Pada masa yang material, saya ialah Setiausaha kepada Lembaga Penasihat, Jabatan Perdana Menteri, Malaysia di Putrajaya. Saya mempunyai kuasa serta saya berhak untuk membuat dan mengikrarkan Afidavit ini bagi pihak Responden-Responden melainkan dinyatakan sebaliknya. Segala fakta dan perkara yang saya nyatakan di sini adalah benar dalam pengetahuan saya sendiri kerana saya hadir dan mengikuti
D prosiding representasi Pemohon di hadapan Lembaga Penasihat. Saya juga mempunyai akses kepada dokumen-dokumen, rekod-rekod pelantikan Anggota Lembaga Penasihat dan rekod-rekod lain yang berkaitan dengan Permohonan ini. Saya tidak dapat mengemukakan nota keterangan, dokumen-dokumen dan rekod-rekod berkaitan kerana saya berpendapat sekiranya dikemukakan ia boleh menjejaskan kepentingan
E negara sepertimana diperuntukkan di bawah seksyen 14 Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 (selepas ini disebut sebagai "Akta tersebut") dan Perkara 151(3) Perlembagaan Persekutuan. Oleh yang demikian, saya menuntut keistimewaan dan perlindungan undang-undang di bawah peruntukan tersebut.

F 3. …

4. Merujuk kepada perenggan 4 Afidavit Jawapan Pemohon, saya menafikan dakwaan tersebut dan mengulangi semula pernyataan saya di perenggan 4 hingga 16 dalam Afidavit Pertama saya. Saya sesungguhnya menegaskan bahawa sebelum prosiding representasi dijalankan, Pemohon
G telah ditanya sama ada Pemohon akan diwakili mana-mana peguam bela. Pemohon mengatakan bahawa Pemohon tidak diwakili oleh peguam bela dan Pemohon juga telah ditanya sama ada Pemohon ingin memanggil saksi. Pemohon memberitahu bahawa Pemohon mempunyai satu (1) orang saksi, iaitu NURBAIZURA BINTI ZOLKOFLI (isteri Pemohon). Seterusnya, pihak Lembaga Penasihat telah mengarahkan DETEKTIF
H KOPERAL TEE TIAN LAI membacakan alasan penahanan dan pengataan-pengataan fakta kepada Pemohon dalam Bahasa Malaysia. Pemohon mengakui faham akan alasan penahan dan pengataan-pengataan fakta yang telah dibacakan kepada Pemohon. Pemohon kemudiannya ditanya sama ada Pemohon mengaku atau tidak terhadap alasan penahanan dan pengataan-pengataan fakta yang telah dibacakan
I tersebut. Pemohon memakumkan bahawa Pemohon tidak mengaku terhadap pengataan-pengataan fakta yang telah dibacakan tersebut. Saya sesungguhnya juga menegaskan bahawa saya tidak dapat mengemukakan nota keterangan, dokumen-dokumen dan rekod-rekod berkaitan kerana

saya berpendapat akan memprejudiskan keselamatan saksi-saksi yang telah memberi keterangan terhadap kes Pemohon nota prosiding Lembaga Penasihat adalah dokumen "Rahsia" dan ianya tidak boleh didedahkan sewenang-wenangnya sepertimana yang diperuntukkan di bawah seksyen 14 Akta tersebut dan Perkara 151(3) Perlembagaan Persekutuan. Oleh yang demikian, saya menuntut keistimewaan dan perlindungan undang-undang berdasarkan kedua-dua peruntukan tersebut. Saya sesungguhnya menegaskan bahawa tiada pelanggaran terhadap peruntukan Perlembagaan Persekutuan, Akta tersebut serta Kaedah-Kaedah Dadah Berbahaya (Langkah-Langkah Pencegahan Khas)(Prosedur Lembaga Penasihat) 1987 (selepas ini dirujuk sebagai "Kaedah-Kaedah tersebut"). Saya sesungguhnya menegaskan bahawa dakwaan Pemohon tersebut adalah tidak berasas.

[25] In my mind, it is not disputed by the parties in the present case that the applicant was not legally represented during the hearing of his representation before the Advisory Board. The court is then left to decide on whether the applicant had requested for and was denied of his right to appoint an advocate by the Advisory Board (as averred by the applicant) or whether at the hearing of the representation, the applicant mentioned that he would not be legally represented (as averred by the respondents).

[26] While it is true that under art. 151(3) of the Federal Constitution and s. 14 of the Act, the respondents are not required to disclose facts or to produce documents which the respondents consider to be against the national interest to disclose or produce, the court is still left to decide on the conflicting affidavit evidence adduced by both parties in the present case. I am of the considered view that the conflicting evidence can only be resolved by either party furnishing any contemporaneous documentary evidence to support their contention respectively. Unless the existence of any other contemporaneous documentary evidence is shown to the contrary, the minutes of the Advisory Board's hearing of the applicant's representation, which is clearly within the custody and control of the respondents, becomes material evidence. In circumstances where the said material evidence is not furnished for the determination of the court, I am of the opinion that an inference favorable to the applicant should be preferred. Again, I am minded that in an application for *habeas corpus*, the burden of satisfying the court that the detention is lawful lies throughout on the detaining authority.

[27] In this regard, I took the similar stand taken by the Federal Court in *Mohammad Azanul Haqimi Tuan Ahmad Azahari v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 8 CLJ 465 (FC) where David Wong Dak Wah CJ (Sabah & Sarawak) (as he then was) in delivering the judgment of the court held that:

[17] Now, whether the appellant was allowed the right to counsel was unclear from the conflicting affidavit evidence. The appellant cited to us the decision in *SK Takaliswaran* (*supra*) which decision we think is on all fours. In that case, this court at p. 710 dealt with the subject of conflicting affidavit evidence in a *habeas corpus* case as follows:

> It is for the respondents to prove that the constitutional and statutory safeguards embodied in art. 151 and s. 6(1) were strictly complied with. The liberty of an individual should not be infringed upon even to the slightest extent without proof that the impugned infringement is in accordance with the Constitution and statute ... And where that evidence is by way of affidavit the court is not spared the task of subjecting its contents to the same tests as in any other case, if not to stricter scrutiny since the case concerns the violation of a constitutionally guaranteed protection ... *Further, where a party upon whom the onus of proof lies adduces conflicting or contradictory evidence, a court assessing that evidence is in the usual way entitled to rule that the burden has not been discharged. And in a matter as important as individual liberty, where contradictory averments are made on oath, the detenu is entitled to rely on the version that is most favourable to him*. Put a little differently, where as in circumstances present here, more than one inference may be drawn from the evidence presented by the detaining authority, the inference most favourable to the detenu must be drawn.
>
> (emphasis added)

[18] It has always been the case with our criminal law that where there are two inferences open against the accused, especially in the face of conflicting evidence, the one most favorable to the accused is to be preferred. See generally: *Yusoff Kassim v. PP* [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376; [1992] 2 MLJ 183 (Supreme Court). We did not see why the approach should be any different in respect of detainees in *habeas corpus* cases. After all, laws which deprive a subject of his right to personal liberty ought to be accorded the same strict construction as penal laws. In *Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & 1 Lagi* [19941 4 CLJ 47, at p. 55, Wan Yahya SCJ had this to say:

> Laws which deprive the subjects of their rights to personal liberty are subject to strict construction in the same way as penal laws - see *Nagin Singh v. Jagannath*, AIR 1944 Lah 422.

[19] In all fairness to the respondents, during the hearing of this appeal, we asked them whether they could adduce the minutes of the Board hearing to support their version of the events. The said minutes constituted material evidence solely within the respondents' custody. We were met with the response that said minutes were 'rahsia'. To us, this argument did not hold water.

[20] Firstly, this court could have viewed that evidence *in camera*. Secondly and in any case, we need only to read the alleged portion proving that the respondents' version of the story was accurate. Nothing more.

[21] Since the burden to justify the detention lies on the respondents, we considered their failure to adduce the said minutes amounted to a wilful withholding of material evidence. Thus, to us, this case not only called for an inference favorable to the appellant, it also called for an adverse

inference against the respondents. Simply, we presumed that had the respondents adduced the contents of the minutes of the Board hearing, the contents of those minutes would have been unfavorable to them ...

[28] In a more recent case of *Chua Kian Voon v. Menteri Dalam Negeri Malaysia & Ors* [2020] 1 CLJ 747, the Federal Court reaffirmed its earlier decision in *Mohammad Azanul Haqimi*'s case as can be seen below:

> [52] The concept of fair trial necessitates the observance of the "equality of arms" principle that each party must be afforded a reasonable opportunity to present his or her case and that such person not be placed at a disadvantage *vis-à-vis* his opponent. In support of that proposition, we refer to the decision of the High Court in *PP v. Mohd Fazil Awaludin* [2009] 2 CLJ 862; [2009] 8 MLJ 579, at para. [12] which decision was subsequently cited with approval by this court in *Dato' Seri Anwar Ibrahim v. PP* [2010] 4 CLJ 265; [2010] 2 MLJ 312. While the said cases related generally to ordinary criminal proceedings, we see no reason why the same principle ought not to apply with equal force to *habeas corpus* proceedings. We held a similar view in our most recent judgment on this subject in *Mohammad Azanul Haqimi Tuan Ahmad Azahari v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 8 CLJ 465, at para. [18], that laws which deprive a subject of his right to personal liberty ought to be accorded the same strict construction as penal laws.

[29] It is also trite that the applicant is entitled to take advantage of any technical defect which has the effect of invalidating his detention. See *Ex Parte Johannes Choeldi & Ors* [1960] 1 LNS 25 (HC), *Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & 1 Lagi* [1994] 4 CLJ 47 (SC), *Mohammad Azanul Haqimi Tuan Ahmad Azahari v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 8 CLJ 465 (FC).

[30] On a separate note, in an attempt to address this issue, the learned Federal Counsel for the respondents referred to the High Court case of *Gunasingam Kolasegaram & Yang Lain lwn. Timbalan Menteri Keselamatan Dalam Negeri Malaysia & Yang Lain* [2005] 8 CLJ 144. The relevant excerpts of Zaharah Ibrahim J's decision which was referred by the learned Federal Counsel is hereby reproduced below:

> Hak Untuk Diwakili Oleh Peguam
>
> Semasa membincangkan Perkara 5(3) Perlembagaan dalam kes *Kam Tech Soon*, Mahkamah Persekutuan tidak pula membincangkan cabang kedua Perkara 5(3) itu.
>
> Sekiranya dikatakan bahawa oleh sebab sub-s. 3(1) Ordinan tidak menghendaki alasan tangkapan dan penahanan di bawah subseksyen itu diberitahukan kepada orang yang ditangkap dan ditahan itu maka alasan itu tidak perlu diberitahukan dan itu tidak bertentangan dengan Perkara 5(3) Perlembagaan Persekutuan, maka saya berpendapat, sebagai lanjutan daripada itu, bahawa oleh sebab s. 3 Ordinan tidak memperuntukkan

bahawa orang yang ditahan mesti diberi hak untuk berunding dengan dan diwakili oleh peguam pilihannya, maka dia tidak perlu diberi hak sedemikian dan penafian hak itu tidak bercanggah dengan cabang kedua Perkara 5(3) itu.

Dalam kes *Mohamed Ezam bin Mohd Noor*, Y.A. Siti Norma HMP (ketika itu) telah membincangkan peruntukan Perkara 5(3) Perlembagaan Persekutuan berkaitan dengan hak untuk diwakili oleh peguam. Beliau memutuskan bahawa undang-undang tentang tahanan pencegahan di bawah Perkara 149 masih tertakluk kepada peruntukan Perkara 5(3) tentang hak untuk diwakili peguam. Bagaimanapun, bagi menjawab persoalan sama ada *habeas corpus* boleh digunakan untuk membebaskan seseorang yang ditahan di bawah s. 73(1) Akta Keselamatan Dalam Negeri 1960 kerana hak itu dinafikan, Y.A. Hakim itu berkata, (di ms. 517) selepas merujuk kepada kes *Lee Man Seng v. Minister for Home Affairs, Singapore & Anor* [1971] 1 LNS 58; [1971] 2 MLJ 137, *Ooi Ah Phua v. Officer-in-Charge of Criminal Investigation, Kedah/Perlis* [1975] 1 LNS 117; [1975] 2 MLJ 198 dan *Sundar Singh v. Emperor* [1930] AIR Lahore 945, bahawa:

> The rationale for refusing *habeas corpus* in the three cases that I have cited seems to be this. A complaint by a person while under lawful detention that he has been refused access to counsel contrary to the second limb of art. 5(3) will not have the effect of rendering his detention unlawful and that *habeas corpus* is not the proper remedy.

Oleh yang demikian, tiada asas untuk mengatakan bahawa tangkapan dan penahanan pemohon kedua tidak sah kerana dia dinafikan haknya untuk berunding dengan dan diwakili oleh peguam.

[31] However, the facts in *Gunasingam Kolasegaram*'s case can be distinguished from the facts in the present case.

[32] In *Gunasingam Kolasegaram*'s case, the issue before the court was regarding the Emergency (Public Order and Prevention of Crime) Ordinance 5, 1969 and the repealed Internal Security Act 1960 which did not specifically and expressly afford the detenu the right to be represented by an advocate. This was in fact the exact observation made by Zaharah Ibrahim J as can be seen below:

> Sekiranya dikatakan bahawa oleh sebab sub-s 3(1) Ordinan tidak menghendaki alasan tangkapan dan penahanan di bawah subseksyen itu diberitahukan kepada orang yang ditangkap dan ditahan itu maka alasan itu tidak perlu diberitahukan dan itu tidak bertentangan dengan Perkara 5(3) Perlembagaan Persekutuan, maka saya berpendapat, sebagai lanjutan daripada itu, bahawa oleh sebab s. 3 Ordinan tidak memperuntukkan bahawa orang yang ditahan mesti diberi hak untuk berunding dengan dan diwakili oleh peguam pilihannya, maka dia tidak perlu diberi hak sedemikian dan penafian hak itu tidak bercanggah dengan cabang kedua Perkara 5(3) itu.

[33] On the other hand, the applicant's right to legal representation was enshrined in the Act and the Rules. See s. 9 of the Act, rr. 4(3), 5(2), 5(3), 6(3), Form I, Form II, and Form III of the Rules. Therefore, I am of the considered view that this particular contention by the learned Federal Counsel does not hold water.

[34] In a nutshell, on this issue, I found in favor of the applicant that there was indeed a breach of a mandatory procedural requirement under the Act and the Rules, which rendered the detention to be unlawful.

Conclusion

[35] In conclusion, based on the reasons enumerated above, and after hearing the submission by both parties, the applicant's application for *habeas corpus* is therefore allowed.